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November 18, 2011

By Hand Delivery

Honorable William K. Suter
Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: *Toby Douglas, et al. v. Independent Living Center of Southern California, Inc., et al.*, Nos. 09-958, 09-1158, 10-283

Dear General Suter:

This letter brief is on behalf of the plaintiffs-respondents Independent Living Center of Southern California, Inc., et al., ("ILC Plaintiffs") in Nos. 09-958 and 09-1158 in response to the November 4, 2011 order of the Court to file supplemental letter briefs on:

> "What should be the effect, if any, of the developments discussed in the letter submitted by the Solicitor General on October 28, 2011, on the proper disposition of this case."[1]

10% rate cut of AB 5

In No. 09-958 the ILC Plaintiffs obtained preliminary injunctions which enjoined the 10% Medicaid provider rate cut of California Assembly Bill (AB) 5:

> - (1) for services on or after July 1, 2008 of physicians, dentists, optometrists, clinics, adult day care health centers, and, for prescription drugs, (August 18, 2008 order);

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[1] The ILC Plaintiffs filing this letter brief are:

In No. 09-958: Independent Living Center of Southern California, Inc.; Margaret Dowling; Mark Beckwith; Gerald Shapiro, Pharm.D., dba Uptown Pharmacy & Gift Shoppe; Sharon Steen, dba Central Pharmacy; Tran Pharmacy, Inc.; Gray Panthers of San Francisco; and Gray Panthers of Sacramento.

In No. 09-1158: Independent Living Center of Southern California, Inc.; Margaret Dowling; Mark Beckwith; Gerald Shapiro, Pharm.D., dba Uptown Pharmacy & Gift Shoppe; Sharon Steen, dba Central Pharmacy; and Tran Pharmacy, Inc.

- (2) for services on or after November 17, 2008 of home health agencies and non-emergency medical transporters (NEMT), (November 17, 2008 order).

The 10% rate cut of AB 5 was terminated by the State legislature as of February 28, 2009.[2]

5% rate cut of AB 1183

In No. 09-1158 the ILC Plaintiffs also obtained preliminary injunction which enjoined the successor 5% Medicaid provider rate cut of AB 1183, which had been enacted to go into effect March 1, 2009 in respect to prescribed drugs.

The 5% rate of AB 1183 in respect to prescribed drugs was terminated by the State legislature as of May 31, 2011.[3]

Administrative action

On November 17, 2010, the Centers for Medicare and Medicaid Services (CMS), an agency within the U.S. Department of Health and Human Services (HHS), disapproved the State Plan Amendments (SPAs) submitted by the State of California for the rate cuts of AB 5 and AB 1183.[4]

CMS disapproval was on the basis that "California has not demonstrated that it would meet the conditions set out in" the Medicaid payment-setting statute, Social Security Act § 1902(a)(30)(A) – "Section 30A."

Since then the following has occurred:

On October 27, 2011, the State withdrew its Request for Reconsideration of CMS' November, 2010 disapproval of the SPA for the 10% rate cut of AB 5, for the eight services which are the subject of the two injunctions obtained by the ILC Plaintiffs in 2008, in No. 09-958.

On October 27, 2011, the State also withdrew its Request for Reconsideration of the CMS disapproval of the SPA for the 5% rate cut of AB 1183 for pharmacy services (including prescribed drugs).

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[2] § 14105.19 Cal. Welf. & Inst. Code, amended Sept. 30, 2008 by Sec. 44, AB 1183.

[3] § 14105.191 Cal. Welf. & Inst. Code, amended March 24, 2011 by Sec. 93.2, AB 97.

[4] This action of CMS was two years after the 10% rate cut of AB 5 was enacted to commence, and 20 months after the 5% rate cut of AB 1183 was enacted to commence.

In the meanwhile:

> In December 2010, the State filed SPA 10-024 which requested CMS to approve the 5% rate cut of AB 1183 for the limited three month period, March - May, 2011; and the State **for the first time submitted information or data to CMS to support its claim that the 5% rate cut of AB 1183 for this window period, complied with the Medicaid rate-setting statute.**
>
> The State legislature enacted AB 97, which, – relative to the subject of this letter brief, – terminated the 5% rate cut of AB 1183 as of May 31, 2011.

Then, on October 27, 2011, CMS – **based on the new information or data submitted by the State for the very first time,** – approved the State's new SPA 10-024 for the 5% rate cut of AB 1183 for pharmacy services for the 3-month period March through May, 2011.

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In summary, the State in effect:

> - has now withdrawn its claim to CMS for CMS approval of the 10% rate cut of AB 5 – which rate cut is the sole subject of No. 09-958, and,
>
> – has now withdrawn as well its claim to CMS for CMS approval of the 5% rate cut of AB 1183, which rate cut is a primary subject of No. 09-1158, – (with one exception, that CMS has now approved the 5% rate cut of AB 1183 for the limited period of three months for only one service, (pharmacy services), due to the fact that the State, for the first time, submitted information or data to CMS which afforded CMS, for the first time, a factual basis or floor upon which to consider and rule that the 5% rate cut of AB 1183 complied with the Medicaid rate-setting statute).

Therefore, in purview of the kaleidoscope of prospective and retroactive actions of CMS and the State, listed above, the ILC Plaintiffs respectfully suggest to the Court that the within three preliminary injunctions obtained by the ILC Plaintiffs in Nos. 09-958 and 09-1158, have become even more unsuitable for certiorari review than they were when respondents first suggested that review by the Court is premature.

Thus the ILC Plaintiffs respectfully suggest that certiorari was improvidently granted, in both of the 09-958 and 09-1158 cases, and that appropriate orders be issued to dismiss these petitions of the petitioner Director, upon that ground.

Discussion

As the Court knows from the record in these cases, the preliminary injunctions in 09-958 and 09-1158 were issued because the Director failed to show the district court any evidence tending to

show that the State complied in any respect with the Medicaid rate-setting statute.

As the October 28, 2011 letter of the Solicitor General shows, the CMS disapproved the State's applications for SPA approvals to implement the same 10% and 5% rate cuts of AB 5 and AB 1183, on the exact same ground as did the district court: namely, that the State failed to provide any information showing that the State complied with the Medicaid rate-setting statute in any respect.

Hence there was simply no discrepancy between the actions of the district court, and the actions of CMS, or the rationales of either for such actions, for disapproving the 10% and the 5% rate cuts of AB 5 and AB 1183. Hence the intimations by the Director in his petitions for certiorari, that there was some inappropriate conflict between the lower court judicial decisions, and their rationale, and the decisions that CMS would render, and CMS' rationale, in respect to the State's non-compliance with the Medicaid rate-setting statute, have proven to be baseless such that, the ILC Plaintiffs respectfully suggest, the grant of certiorari in 09-958 and 09-1158 should now be recognized as having been improvidently granted.

The ILC Plaintiffs also point out to the Court that now, when and if the Director returns to the district court to seek an order to terminate the existing preliminary injunction enjoining the 5% rate cut of AB 1183, – for the limited three-month window which has now recently been approved by CMS, – that if the Director submits the same information or data to the district court, which the Director presented to CMS to obtain CMS approval for the 5% rate cut of AB 1183 for this three-month period, – that the district court might agree with the Director, and, issue an order to terminate this particular preliminary injunction for this limited three-month period. **Such a result would thereby render completely unnecessary any application to the Court by the Director,** for any relief whatsoever in the matter of the 5% rate cut of AB 1183, and would relieve the Court of any necessity to construe the Constitution in respect to this remaining matter, at all.

Summary and prayer

Based on the above facts, the ILC Plaintiffs respectfully suggest to the Court that the within certiorari proceedings in Nos. 09-958 and 09-1158 should now be dismissed, for having been improvidently granted or, on the basis that ensuing events, above related, have rendered improvident the initial grant of certiorari in these cases, Nos. 09-958 and 09-1158.

This, in line with the wise policy of the Court, which has served it through many storms, to avoid engaging in construing the Constitution, where there is no necessity to do so.

Respectfully submitted,

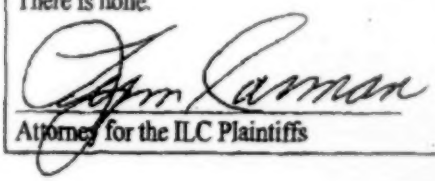
Lynn S. Carman
Stanley L. Friedman

By _____
Attorneys for the ILC Plaintiffs

(Rule 29 Statement below):

RULE 29 STATEMENT

There is none.



Attorney for the ILC Plaintiffs